

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

EVIDENTIARY HEARING

BEFORE THE HONORABLE NANNETTE A. BAKER
UNITED STATES MAGISTRATE JUDGE

JULY 23, 2021

APPEARANCES:

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(PROCEEDINGS STARTED AT 10:01 AM.)

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT AND WITH

THE DEFENDANT PRESENT:)

THE COURT: Good morning. We are on the record now in the matter of United States of America v. Robert McNair, Cause No. 4:21-CR-038, and we are set today for an evidentiary hearing in this case.

At this time, I'm going to ask counsel for the Government to announce your presence for the record.

MR. SCHARF: William Scharf for the United States,
Your Honor.

THE COURT: And counsel for the defendant.

MR. MARTIN: Ryan Martin on behalf of the defendant,
Your Honor.

THE COURT: All right. And as I stated, we are here for an evidentiary hearing. The defendant has filed a motion to suppress evidence; correct?

MR. MARTIN: Yes, Your Honor.

THE COURT: And at this time, does the Government have -- how many witnesses do you anticipate having?

MR. SCHARF: Just one, Your Honor.

THE COURT: Okay. And does the defendant anticipate having witnesses?

MR. MARTIN: No, Your Honor.

25 THE COURT: All right. You may proceed.

1 MR. SCHARF: Thank you, Your Honor. Where would
2 you -- I know with COVID and everything, where would you like
3 me? At the podium?

4 THE COURT: You can be at the podium, yes.

5 MR. SCHARF: Thank you, ma'am.

6 The United States would call U.S. Probation Officer
7 Rebecca Cory, Your Honor.

8 **(WITNESS SWORN BY THE CLERK.)**

9 THE COURT: You may proceed.

10 MR. SCHARF: Thank you, Your Honor.

11 **REBECCA CORY,**

12 **HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS**
13 **FOLLOWS:**

14 **DIRECT EXAMINATION**

15 **BY MR. SCHARF:**

16 Q Could you please state your name for the record.

17 A Rebecca Cory.

18 Q And what's your occupation, Ms. Cory?

19 A U.S. probation officer.

20 Q And in your capacity as a U.S. probation officer, what
21 are your -- what are your duties?

22 A Our duties are to monitor the person on supervision and
23 their activities as well as make sure that they are completing
24 the conditions that the judge has ordered.

25 Q And this is people who are on federal supervised release;

1 is that correct?

2 A Correct.

3 Q And how long have you been in this position for?

4 A Four years.

5 Q And in that time, very roughly, how many people on
6 supervised release would you estimate you've supervised?

7 A Five hundred.

8 Q Five hundred in four years?

9 A Uh-huh.

10 Q And were you assigned to supervise Robert Istill McNair?

11 A Yes.

12 Q And do you see him in the courtroom today?

13 A Yes.

14 Q Could you identify him by a piece of clothing he's
15 wearing.

16 A The yellow shirt.

17 MR. SCHARF: Can the record reflect the
18 identification, Your Honor?

19 THE COURT: The record will reflect that the
20 defendant has been identified by the witness.

21 Q (BY MR. SCHARF) So after you were assigned to supervise
22 Mr. McNair, did you go through with him the conditions of his
23 supervision?

24 A Yes.

25 Q And did one of those conditions relate to where he was

1 and wasn't allowed to go?

2 A Yes.

3 Q What was that condition?

4 A It's a standard condition that they cannot leave the
5 district in which they are authorized to reside without prior
6 permission from the probation office or court.

7 Q And his district was the Eastern District of Missouri; is
8 that right?

9 A Correct.

10 Q And did you also discuss with him the need that he be
11 truthful with you?

12 A Correct.

13 Q And is that also a standard condition of supervision?

14 A Correct.

15 Q And was there a condition that related to contact with
16 law enforcement?

17 A Yes. That's also a standard condition.

18 Q And what is that condition?

19 A He must report any contact with law enforcement within 72
20 hours.

21 Q And was there also a condition that related to firearms
22 or ammunition?

23 A Yes. That's a mandatory condition. You are not supposed
24 to use, possess, or have access to any firearm or dangerous
25 weapon.

1 Q And there was also a special condition imposed on
2 Mr. McNair related to searches; is that right?

3 A Correct.

4 Q And what was that condition?

5 A The search condition states that, if there is reasonable
6 suspicion, that the probation office can come into the
7 residence or search his person, office, vehicle, et cetera,
8 for evidence of violation of that condition.

9 Q And you went through all of these conditions with
10 Mr. McNair when he began to be under your supervision; is that
11 correct?

12 A Correct.

13 Q Do you recall an incident involving Mr. McNair that you
14 were informed of on August 19, 2020?

15 A Yes.

16 Q What happened on that date?

17 A Mr. --

18 MR. MARTIN: I'm going to object. This is -- I think
19 this is hearsay.

20 THE COURT: Go ahead.

21 MR. SCHARF: Your Honor, I'm asking the witness to
22 relate what she was told. I'm not offering it for the proof
23 of what she was told, but it speaks to her state of mind and
24 her understanding of just what she was being told.

25 THE COURT: Overruled.

1 A I received a call from the defendant reporting that he
2 had had contact with law enforcement and that he was a witness
3 to a -- an -- sorry -- motor vehicle accident.

4 And then shortly after on the same date, I received a
5 call from an Illinois State Trooper reporting that there was
6 indeed a motor vehicle accident in which Mr. McNair was
7 involved as the sole driver of the motorcycle. And during
8 that traffic stop, or the reporting of the accident, a firearm
9 was located in or around the path of travel that the
10 motorcycle took along with where -- the general vicinity where
11 his other articles were located.

12 Q Let me back you up just a minute. So on August 19, 2020,
13 you received a call from the defendant; is that right?

14 A Correct.

15 Q And what did he tell you specifically?

16 A That he was a witness in an accident and so he had
17 contact with law enforcement.

18 Q Did he tell you where that accident was?

19 A It was -- I believe he said the city, but it was breaking
20 up, and so I did not -- I'm not sure exactly where.

21 Q Understood. And then you received a call from an
22 Illinois State Trooper; is that right?

23 A Correct.

24 Q And do you want to run through exactly what he told you?

25 A Yes. He said that there --

1 MR. MARTIN: Judge, just for the record, can you note
2 my continuing objection?

3 THE COURT: Yes. The Court will note the defendant's
4 continuing objection to this line of testimony.

5 MR. SCHARF: Understood, Your Honor.

6 MR. MARTIN: Thank you.

7 A So the Illinois State Trooper called and reported that he
8 had had contact with Mr. McNair in Washington Park, Illinois,
9 which is outside of the district of the Eastern District of
10 Missouri.

11 Q And being outside of the Eastern District of Missouri was
12 itself a violation of the conditions of supervised release
13 that Mr. McNair was under; is that right?

14 A Correct.

15 Q Please continue.

16 A Okay. Then he reported that there was a single
17 motorcycle accident with very minimal damage and the defendant
18 identified himself as the driver of the vehicle. The state
19 trooper asked for his license and registration. Mr. McNair
20 provided his license to the trooper and then asked to be able
21 to search the ditch for his registration and insurance card.

22 And when he was allowed to do that, what ended up is
23 that Mr. McNair left the scene. So the state trooper then
24 searched the ditch where all the property was scattered and
25 during that search located a firearm.

1 Q And that firearm was later identified as a Taurus 9 mm
2 semi-automatic handgun; is that right?

3 A Correct.

4 Q After you spoke with the Illinois State Trooper, did you
5 speak to Mr. McNair again?

6 A Yes.

7 Q And what did you ask him, and what did he tell you?

8 A Honestly, I cannot remember.

9 Q After learning about this incident, what further action
10 did you take?

11 A I talked to my supervisor, and at that time, we decided
12 that it would be best to request a search of his residence be
13 conducted.

14 Q And why was that?

15 A Because of the report of him possibly being in possession
16 of the firearm and the state trooper's suspicion that he was
17 in possession of it as well as his other violations pertaining
18 to that event.

19 Q So based on your training and experience, why was the
20 firearm recovered at the scene concerning to you?

21 A It's a violation of his conditions of supervision -- not
22 to possess a firearm or ammunition. And based on my training
23 and experience, if they've had a firearm, they are likely
24 going to be committing other crimes or involved in other
25 criminal activities.

1 Q So there was, in fact, a search authorized by the court
2 in this case; is that right?

3 A Correct.

4 Q And that search was authorized on August 26, 2020; is
5 that right?

6 A Correct.

7 Q But that search wasn't immediately conducted; right?

8 A Correct.

9 Q Why is that?

10 A Because of the coronavirus, things started getting shut
11 down, and so our procedures kind of went on a stall to
12 determine whether -- you know, the safety of working in
13 different environments. And so it was postponed numerous
14 times.

15 Q And did you take any action during those postponements?

16 A Yeah. Mr. McNair was placed on location monitoring so
17 that we could monitor his whereabouts.

18 Q And why was that?

19 A Because he had left the district and because of the
20 suspicion that he was involved in criminal activity still.

21 Q There eventually was a search conducted in this case; is
22 that right?

23 A Correct.

24 Q When was that?

25 A November.

1 Q And at the time the search was conducted, your principal
2 concerns were still related to this accident in Illinois?

3 A The concern was that he could be in possession of a
4 firearm or be engaged in other criminal activity based on the
5 suspicion with his violation of conditions pertaining to the
6 Illinois event.

7 Q So in November what happened exactly?

8 A So the defendant reported to the probation office. He
9 was then placed in custody at that time by our search team.
10 He was transported with the search team and myself to his
11 residence in which, then, the search was conducted.

12 Q And did he say anything to you during that
13 transportation?

14 A On the way from the courthouse to his residence, he
15 indicated that there was a firearm in the residence, and he
16 stated that it was his roommate's.

17 Q Mr. McNair had recently moved residences; is that right?

18 A Correct.

19 Q And so what was his living situation at the time of the
20 search?

21 A He had one roommate, and she had minor children living at
22 the residence as well.

23 Q And was -- had she -- had Mr. McNair indicated that she
24 was a romantic partner?

25 A No. He said that they were co-workers.

1 Q Did he have his own bedroom in the residence where he was
2 living?

3 A Yes.

4 Q And you did not believe that they cohabited?

5 A Not to my knowledge.

6 Q So while he was being transported to his house for the
7 search, Mr. McNair said that his roommate might have a gun; is
8 that right?

9 A Yes.

10 Q And then the search was conducted; is that right?

11 A Correct.

12 Q And what happened then?

13 A During the search, they located a firearm and a magazine
14 in the nightstand next to Mr. McNair's bed. In the nightstand
15 also was Mr. McNair's ID card.

16 Q And that gun was a Sig Sauer .357 caliber, semi-automatic
17 handgun; is that right?

18 A Yes.

19 Q There were also two handgun magazines found during the
20 search; is that right?

21 A Yes.

22 Q And those were both 9 mm caliber magazines; is that
23 right?

24 A I believe so.

25 Q And that's the same caliber as the gun that was recovered

1 from the scene in Illinois; is that right?

2 A Correct.

3 Q What happened then?

4 A He was placed into custody and taken to the Jennings jail
5 after a warrant was issued for his arrest.

6 MR. SCHARF: Nothing further, Your Honor.

7 THE COURT: You may cross-examine.

8 **CROSS-EXAMINATION**

9 **BY MR. MARTIN:**

10 Q So this Illinois incident -- you weren't personally
11 involved in that; right?

12 A No.

13 Q And you didn't witness anything in that incident
14 personally?

15 A No.

16 Q So the information that you're getting is coming from
17 another individual; right?

18 A Yes.

19 Q Okay. So you said that Mr. -- you said that Mr. McNair
20 was placed on location monitoring after this Illinois
21 incident. What did that involve?

22 A Location monitoring involves having a bracelet that
23 monitors his whereabouts. And the defendant is required to
24 submit a schedule every month so that we know where he is
25 supposed to be and we can allow him to be out of the residence

1 for work purposes.

2 Q Okay. And did he comply with that?

3 A Yes.

4 Q And were there any violations that you noticed from that
5 monitoring?

6 A Minor violations such as being at a location that we
7 didn't know. He was allowed to be out at that time but not at
8 that specific location.

9 Q Okay. So you were there for the actual search of his
10 residence; right?

11 A I was in the car with Mr. McNair.

12 Q Okay. Did you participate in the search at all?

13 A No.

14 Q So you don't know how the search was conducted at all?

15 A No.

16 Q Okay. So the information that you're receiving is coming
17 from other people who actually conducted the search?

18 A Correct.

19 Q So you couldn't tell us where these items were found in
20 the residence?

21 A Correct.

22 Q Just through other people; right?

23 A Right. I did go into the house once they did locate
24 those items, and I did personally witness them being in the
25 residence.

1 Q Okay. But you don't know if they were in plain view, you
2 know, personally, or anything like that; right?

3 A Correct.

4 Q Just what you know from other people. All right.

5 And his bedroom -- can you explain how his bedroom
6 was in the residence?

7 A It was in a hallway to the left. Had a bed, a
8 nightstand, a dresser.

9 Q Okay. When you say "hallway," what do you mean exactly?
10 Was it like -- was it a traditional bedroom-style bedroom, or
11 was it like in the open somewhere?

12 A No. It was a bedroom.

13 Q But you said it was in the hallway?

14 A It was off of the hallway. There was a hallway from the
15 living room, and then to the left was -- or I'm sorry. The
16 living room was the front room. To the left, then, was a
17 hallway, and his bedroom was off of the hallway.

18 Q Okay. Do you know how many beds were in that room?

19 A One.

20 Q And then could you describe the room for us.

21 A It was one bed, one nightstand, and there was a dresser.

22 Q Okay. Do you know how long he had been living at that
23 place at the time of the search?

24 A He had reported that he moved approximately a month
25 before the search was conducted.

1 Q Okay. And the search was conducted on November 12, 2020?

2 A Correct.

3 Q All right. So this Illinois incident occurred in August
4 of 2020; is that right?

5 A Correct.

6 Q And at that time, a search was authorized by the court?

7 A Correct.

8 Q But because of COVID, you guys didn't search?

9 A Not at that time.

10 Q Okay. And then you didn't search that entire month of
11 August; right?

12 A Correct.

13 Q Or the entire month of September?

14 A Correct.

15 Q Then in October his conditions of MSR are modified to
16 include the 90-day location?

17 A Correct.

18 Q And sometime in October, too, Mr. McNair moved into a new
19 residence; right?

20 A Correct.

21 Q And whenever he was in the new residence, a virtual
22 walk-through was conducted; right?

23 A Correct.

24 Q Can you explain exactly what that means?

25 A So basically it's a Facetime or a virtual meeting, and

1 he -- I have them flip the camera and walk through the
2 residence and show me where all the rooms are, what the rooms
3 look like, and what's in the rooms.

4 Q Okay. And at that time, did you see any evidence of any
5 criminal activity or anything like that?

6 A No contraband was observed in plain view.

7 Q Okay. And that was in October of 2020. The search was
8 conducted November 12, 2020; right?

9 A Correct.

10 Q And so why was it -- why on November 12, 2020?

11 A That's when the search team was available and the office
12 determined that it was safe procedurally to conduct the search
13 based on COVID.

14 Q Okay. And at that time, to your knowledge, were any
15 vaccines available or anything like that?

16 A I'm not sure, to be honest.

17 Q Okay. So the search team -- what search team are you
18 referring to?

19 A The probation search team.

20 Q And so the search team, the probation search team -- they
21 thought in August that you guys had protocols, were not
22 searching any residence, or are you picking and choosing which
23 are priority cases?

24 A I'm not sure. I know that that did not come from the
25 search team itself but by our managerial.

1 Q Okay. So you don't know if you guys conducted any
2 searches from August 2020 through October 2020?

3 A I'm not sure.

4 Q Okay. So other than your protocol at your -- from your
5 superiors, you don't know why the search was delayed from
6 August to November other than the COVID protocols; right?

7 A Correct.

8 Q Did you find any other -- were there any other
9 allegations, to your knowledge, that Mr. McNair was in
10 possession of any firearms?

11 A No.

12 Q Were there any allegations that he possessed any drugs or
13 firearms or any type of criminal activity going on in his
14 residence?

15 A No.

16 Q And this was at either residence; right? Because he
17 moved.

18 A Correct.

19 Q So your search, even though you didn't participate in it
20 personally, was conducted solely because --

21 MR. SCHARF: Objection, Your Honor. I think that the
22 record the witness has made indicates that she was personally
23 involved to an extent in the search.

24 THE COURT: Her testimony -- I recall her testimony
25 being that she did not conduct the search. She did go in

1 after the items were found, if I am -- if that's my
2 recollection.

3 THE WITNESS: Yes, Your Honor.

4 THE COURT: Is that correct?

5 All right. So I understand that. And I will allow
6 his question based on my understanding of what happened.

7 MR. MARTIN: Thank you, Your Honor.

8 Q (BY MR. MARTIN) So the sole reason for your search on
9 November 12, 2020, was because of what you learned through
10 another individual about a firearm in October -- or I'm
11 sorry -- in August of 2020. Is that fair to say?

12 A It was not just based on the firearm. If we have
13 reasonable suspicion that any condition of his supervision has
14 been violated, then we are authorized to search the residence
15 for evidence of the violations.

16 Q Okay. So you -- so say that one more time. I'm sorry.

17 A So the search condition states that we are able to come
18 in and search the residence more thoroughly than a plain-view
19 search if we have reasonable suspicion that the defendant has
20 violated any conditions of their supervision.

21 Q And your reasonable suspicion was based on the firearm;
22 right?

23 A The reasonable suspicion was also he was in located in
24 Illinois, which is a violation of his condition as well.

25 Q Okay. And that was all based on information that you got

1 from a third party?

2 A Correct.

3 MR. MARTIN: I don't have any other questions. Thank
4 you.

5 THE COURT: Yes. You may proceed.

6 MR. SCHARF: Thank you, Your Honor.

7 **REDIRECT EXAMINATION**

8 **BY MR. SCHARF:**

9 Q The defendant did himself confirm that he had been at the
10 scene of this motorcycle accident; is that right?

11 A Yes.

12 Q And did he admit to you that it occurred in Southern
13 Illinois?

14 A I do not remember.

15 Q But he reported to you that he had had interaction with
16 law enforcement; is that right?

17 A Yes. We did discuss, actually, that he -- his conditions
18 being able to go over to another district. So I can't say
19 definitively whether he admitted to being in Illinois, but I
20 do recall us talking specifically about that condition and
21 that he was -- and reminding him about that condition since it
22 was a violation.

23 Q And at the time the search was conducted, you were still
24 suspicious that he was violating terms of his supervision; is
25 that right?

1 A Yes.

2 Q And that was based on the incident in Illinois; is that
3 right?

4 A Yes.

5 Q Was that also based on other issues that he had had with
6 location monitoring?

7 A Yes, going to locations that he was not authorized to be
8 at.

9 Q When people violate terms of their supervision, do they
10 tend to, I guess, reoffend?

11 Let me rephrase. I apologize, Your Honor.

12 When you become aware that people under supervision
13 have violated the terms of their supervision, do those
14 violations often form a pattern?

15 A Yes.

16 Q So a violation of one term of supervision could easily
17 indicate that a defendant is violating other terms of
18 supervision as well; is that right?

19 A Yes.

20 Q Now, the defense counsel made the point that you were not
21 personally involved in the incident in Illinois; right?

22 A Correct.

23 Q Did the information you were told by both the defendant
24 and this police officer in Illinois inform your views of the
25 defendant's supervision?

1 A Yes.

2 MR. SCHARF: I have nothing further, Your Honor.

3 THE COURT: Do you have more?

4 MR. MARTIN: No, Your Honor.

5 THE COURT: Okay. I actually do have a question.

6 You testified that there was a judicial or court
7 authorization for the search back in August. So was there a
8 search warrant, or what was the authorization?

9 THE WITNESS: No. The judge, Judge Clark, authorizes
10 when a search is completed, and I don't know the procedures
11 besides the assistant deputy.

12 THE COURT: So the district judge authorized a search
13 based on the issues that occurred in Illinois.

14 THE WITNESS: Correct, Your Honor.

15 THE COURT: So the search that eventually took place
16 in November -- was that done pursuant to that judicial
17 authorization?

18 THE WITNESS: Yes, Your Honor.

19 THE COURT: Okay. Does anyone have any additional
20 questions?

21 MR. SCHARF: Not us, Your Honor.

22 THE COURT: Okay. And nothing on behalf of the
23 defendant now that I asked that question?

24 MR. MARTIN: No. No, Judge.

25 THE COURT: All right.

1 You may step down. You're excused.

2 Is there any additional testimony or evidence on
3 behalf of the Government?

4 MR. SCHARF: We have no further witnesses at this
5 time, Your Honor.

6 THE COURT: All right. Anything on behalf of the
7 defendant at this time?

8 MR. MARTIN: No, Your Honor.

9 THE COURT: And so I have the briefs that were filed
10 in this case. And I just want to make sure. So you filed a
11 motion, but I do not see a memorandum in support. Or did I --
12 maybe I'm not looking in the right place.

13 Did you file a memorandum in support?

14 MR. MARTIN: I did not, Judge.

15 THE COURT: What I'm going to allow you to do, then,
16 is to file a post-hearing memorandum. And if you wish to
17 order a transcript, I will allow you to, once you receive the
18 transcript, to have a period of time. How much time -- would
19 you be ordering a transcript?

20 MR. MARTIN: I don't think so.

21 THE COURT: Okay. You won't be ordering a
22 transcript.

23 Does the Government wish to order a transcript?

24 MR. SCHARF: We won't if they don't, Your Honor.

25 THE COURT: All right. So how much time do you need,

1 then, to file post-hearing briefing?

2 MR. MARTIN: I'm going on vacation next week. So
3 could I have 30 days?

4 THE COURT: Thirty days to file -- yes.

5 MR. MARTIN: Thank you.

6 THE COURT: And then how much time would you need for
7 response?

8 MR. SCHARF: Just a week, Your Honor.

9 THE COURT: Okay. So the defendant will have 30 days
10 from today to file a post-hearing brief, and that should take
11 us to -- we are at the 23rd. So I will give you until August
12 23. And then the Government will have until August 30 to file
13 a response.

14 MR. MARTIN: Thank you, Judge.

15 THE COURT: And I will rule after I receive briefing
16 in this case. Thank you.

17 MR. SCHARF: Thank you, Your Honor.

18 THE COURT: That concludes this proceeding.

19 **(PROCEEDINGS CONCLUDED AT 10:29 AM.)**

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CERTIFICATE

I, Shannon L. White, Registered Merit Reporter and Certified Realtime Reporter, hereby certify that I am a duly appointed Official Court Reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that this transcript contains pages 1 through 26 inclusive and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

Dated at St. Louis, Missouri, this 8th day of September, 2021.

/s/Shannon L White
/s/Shannon L. White
Shannon L. White, CRR, RMR, CCR, CSR
Official Court Reporter